Supreme Court, U.S.
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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

LESTER L. WELLS,
Petitioner,

v.

MICHAEL W. MOORE, as Secretary of the
DEPARTMENT OF CORRECTIONS, State of Florida,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether a trial judge has the obligation to disqualify retained counsel when presented with a conflict of interest which undermines the integrity of the trial proceedings and the defendant seeks to waive the conflict.

B. PARTIES INVOLVED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

LESTER L. WELLS,
Petitioner,

v.

MICHAEL W. MOORE, as Secretary of the DEPARTMENT OF CORRECTIONS, State of Florida,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, LESTER L. WELLS, respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 14 February 2001, rehearing denied on 28 March 2001.

D. CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, affirmed without a reported opinion, *Wells v. Moore,* 250 F.3d 749 (11th Cir. 2001), and is reproduced in the Appendix (hereinafter "A"), (A-2). Rehearing was denied on 28 March 2001. (A-1).

E. BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1), to review the final judgment of the United States Court of Appeals for the Eleventh Circuit rendered on 14 February 2001, (A-2), rehearing denied 28 March 2001. (A-1).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions

The case requires interpretation and application of Amendment VI of the Constitution of the United States, which provides, in pertinent part:

> Amendment VI:
>
> In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of counsel for his defence.

2. Statutory Provisions

28 U.S.C. § 2254:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

Court of the United States;

G. STATEMENT OF THE CASE

1. The first trial of Petitioner.

On 10 November 1983, in Santa Rosa County, Florida, Petitioner Wells was arrested and later charged by indictment with the first degree murder of James Wyche (Count I); first degree murder of Billy Wyche (Count II); and attempted first degree murder of Wayne Enfinger (Count III). (R2-2).[1] Codefendant Jerry Wayne Weeks, (R2-2), was charged with the same offenses in the same indictment. In a separate indictment, Wilbur Weeks and Anthony Weeks, father and brother of codefendant Jerry Wayne Weeks, respectively, were charged as principals to the same offenses. (R2-2).

On 01 May 1984, the first trial of Petitioner Wells ended shortly after jury selection by a mutually consented mistrial due to a conflict of interest. (R2-2). Petitioner Wells

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[1]Record references to *Weeks v. Moore*, Eleventh Circuit Case No. 00-12781-HH.

was being represented by James Burke, Jr., at the same time his codefendant, Jerry Wayne Weeks, was being represented by J. LaDon Dewrell, Ft. Walton Beach, of the same law firm. (R2-3). Mr. Burke withdrew from representation of Petitioner Wells and with his boss, Mr. Dewrell, began to represent codefendant Jerry Wayne Weeks, and both were allowed to continue to represent Jerry Weeks' brother, Anthony Weeks, in the same, but separately charged offenses. (R2-3). On or about 16 May 1984, pursuant to the recommendation of Mr. Dewrell (R2-3), James P. Judkins of the then existing law firm of Davis, Judkins & Simpson, Tallahassee, Florida, began to represent Petitioner Wells, and in the companion case, Wilbur Weeks. Mr. Judkins was assisted by his law partner, Larry Simpson. (R2-3-4).

The separate case of Anthony Weeks and Wilbur Weeks went to trial on 02 June 1984, and both were convicted of two counts of principal to manslaughter and principal to attempted

manslaughter. At that trial, the law firm of Dewrell & Burke represented Anthony Weeks, and the law firm of Davis, Judkins & Simpson, (James P. Judkins and Larry D. Simpson), represented Wilbur Weeks. (R2-3)

2. The second trial of Petitioner.

In July of 1984, Petitioner Wells and Jerry Wayne Weeks went to trial, and both defendants were convicted as charged on 24 July 1984. (R2-3). Petitioner Wells was represented at trial by James P. Judkins, and Codefendant Jerry Wayne Weeks was represented by LaDon Dewrell. (R2-3-4)

3. Conviction reversed on appeal.

Mr. Judkins filed a notice of appeal on behalf of Petitioner Wells, and James Burke filed a notice of appeal on behalf of Jerry Wayne Weeks. (R2-4). Petitioner Wells' attorney, Mr. Jimmy Judkins, then filed a notice of appeal on behalf of Wilbur Weeks. One day later a notice of appeal was filed on behalf of Anthony Weeks by Mr. Burke. (R2-4).

Subsequently, Mr. Burke withdrew from his representation of Anthony Weeks and Jerry Wayne Weeks on appeal and the law partner of Petitioner Wells' attorney (Larry Simpson) was substituted as counsel of record for the appeal. (R2-4). At that point, *the same law firm* of Davis, Judkins & Simpson of Tallahassee, Florida, *represented all four defendants*. (R2-4).

On 18 July 1986, the First District Court of Appeal reversed and remanded for a new trial the case of Petitioner Wells and Jerry Wayne Weeks. *Wells v. State*, 492 So.2d 712 (Fla. 1st DCA 1986), *rev. denied, State v. Wells*, 501 So.2d 1283 (Fla. 1986). On 21 July 1986, the First District Court of Appeal reversed and remanded with directions to discharge Wilbur Weeks and Anthony Weeks. *Weeks v. State*, 492 So.2d 719 (Fla. 1st DCA 1986), *rev. dismissed, State v. Weeks*, 503 So.2d 328 (Fla. 1987).

4. The third trial of Petitioner.

On 10 February 1988, the third jury trial of Petitioner

Wells and Jerry Wayne Weeks commenced. Petitioner Wells and codefendant Jerry Wayne Weeks were again represented by the same law firm. (R2-4). Another client of the firm and former codefendant, Anthony Weeks, was called as a witness for the state during the trial. (R2-5). The other client of the firm, codefendant Wilbur Weeks, was not called as a witness by either side.

Petitioner Wells testified at trial relying heavily on an alibi defense. (R2-5). Codefendant Weeks did not testify, called no witnesses, and relied heavily on Petitioner's defense. On 19 February 1988, Petitioner Wells and Jerry Wayne Weeks were found guilty as charged. Petitioner Wells was sentenced to a minimum mandatory life sentence without eligibility for parole for 25 years on Count I; life imprisonment without parole eligibility for 25 years on Count II; and 10 years on Count III. The sentences imposed on Counts I and II were to run consecutively and the sentence imposed on Count III was

to run concurrently with the sentences imposed on Counts I and II. Jerry Wayne Weeks received the same sentence. (R2-5).

5. Conviction affirmed on direct appeal.

On his second direct appeal, Petitioner Wells was represented by the Office of the Public Defender. Jerry Wayne Weeks was represented by Paul A. Levin of Clearwater. On 16 February 1989, the First District Court of Appeal *per curiam* affirmed, and mandate was issued on 13 April 1989. *Wells v. State*, 541 So.2d 1176 (Fla. 1st DCA 1989).

6. State postconviction proceedings.

By way of a state motion for post conviction relief filed on 9 April 1991, pursuant to Florida Rule of Criminal Procedure 3.850, Petitioner Wells first raised the claims that he was denied the effective assistance of counsel as a result of the conflict of interest caused by the representation of three codefendants by the same law firm as his own counsel. Codefendant Anthony Weeks, another client of the same law

firm, was called at the evidentiary hearing, but asserted the Fifth Amendment. The motion for post conviction relief was denied in the state trial court on 29 September 1994. (A-69). The First District Court of Appeal, State of Florida, *per curiam* affirmed. *Weeks [and Wells] v. State,* 679 So.2d 779 (Fla. 1st DCA 1996). Petitioner Wells filed a motion for rehearing on 9 August 1996, which was denied on 23 September 1996. *Id.*

7. Federal habeas corpus proceedings.

Petitioner Wells then filed a Petition for Writ of Habeas Corpus by Person in State Custody in the United States District Court, Northern District of Florida, Pensacola Division, pursuant to 28 U.S.C. § 2254, on 25 August 1997. On 29 February 2000, the magistrate issued a Report and Recommendation that recommended the district court deny the conflict of interest claim without evidentiary hearing. (A-11). The district court adopted the magistrate Report and Recommendation in full by order dated 28 April 2000. (A-9).

A Certificate of Appealability was granted on 12 July 2000. (A-5).

8. Habeas corpus appeal.

Petitioner Wells appealed to the United States Court of Appeals for the Eleventh Circuit, alleging that the state court unreasonably applied clearly established federal law on the issue of conflict of interest, pursuant to *Cuyler v. Sullivan,* 446 U.S. 335, 104 S.Ct. 482, 64 L.Ed.2d 333 (1980). Additionally, Petitioner Wells argued that the order of the state court was based on an unreasonable application of federal law regarding waivers of conflicts of interest. After oral arguments, the United States Court of Appeals for the Eleventh Circuit issued an unpublished opinion affirming the decision of the district court below on 14 February 2001, holding:

> We have reviewed the record and heard oral arguments in this case. We conclude that the district court did not err when it adopted the magistrate judge's report and recommendation, which was thorough and accurate. Appellant knowingly, voluntarily, and intelligently waived

> the alleged conflicts of counsel resulting from (1) the paired representation of codefendants and (2) the representation of a prosecution witness by counsel's law firm.

(A-3-4).

H. REASONS FOR GRANTING THE WRIT

1. A conflict of interest which affects the fundamental integrity of the trial also undermines the integrity of the judicial process and cannot be waived by a defendant.

The state courts below and the United States Court of Appeals for the Eleventh Circuit have decided an important federal question in a way that has not been previously settled by the Court. Petitioner Wells' federal due process right to a fundamentally fair trial was violated by the state court system which not only failed to disclose and explain the ramifications of the actual conflict of interest under which the representing law firm labored, the state court system further violated Petitioner Wells' right to conflict-free counsel by the failure of the trial court to take remedial action in disqualifying counsel from the representation of Petitioner Wells. The public interest in a fundamentally fair trial proceeding outweighed the right of

Petitioner Wells to the counsel of his choice, and the state trial court should have balanced the rights of the public against the choice of Petitioner Wells by disregarding the purported waiver of the defendant. The judge should have disqualified counsel over the objection of the defendant.

Defense counsel and the state court judge did not fully understand, or state, the implications sufficiently as a matter of law to obtain a valid waiver by Petitioner Wells. The Sixth Amendment to the Constitution guarantees that in "all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." This right requires that the assistance of counsel be "effective." Resolving ineffective assistance of counsel claims usually involves the application of the familiar two-part test set forth in *Strickland v. Wainwright*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, a more lenient standard is applicable when determining ineffective assistance of counsel claims due to a

conflict of interest.

Under *Cuyler v. Sullivan,* 446 U.S. 335, 104 S.Ct. 482, 64 L.Ed.2d 333 (1980), a petitioner must "establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 446 U.S. at 350, 100 S.Ct. at 1719. If the petitioner establishes both the actual conflict and adverse performance prongs of the *Cuyler* test, he need not demonstrate "prejudice" as that term is defined in *Strickland. Id.* Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his legal representation need not demonstrate prejudice to obtain relief. *Cuyler,* 446 U.S. at 349-350, 100 S.Ct. at 1719; *see also, Holloway v. Arkansas,* 435 U.S. 475, 487-491, 98 S.Ct. 1173, 1180-1182, 55 L.Ed.2d 426 (1978); *Glasser v. United States,* 315 U.S. 60, 72-75, 62 S.Ct. 457, 465-467, 86 L.Ed.2d 680 (1942).

The Court has stated that courts have the power and duty to disqualify counsel where the public interest in

maintaining the integrity of the judicial system outweighs the accused's constitutional right to counsel of his choice. *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). While a defendant generally may waive his Sixth Amendment right to counsel, "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Id.* at 159, 108 S.Ct. at 1697. When a lawyer's conflict, actual or potential, may result in inadequate representation of a defendant or jeopardize the court's institutional interest in the rendition of a fair verdict, a trial judge has the obligation to disqualify an attorney and a duty to decline a proffered waiver. *Id.* at 162-63, 108 S.Ct. at 1698-99.

An actual conflict of interest existed for Petitioner's counsel. The conflict manifested itself adversely to Petitioner Wells when defense counsel continued to represent Petitioner

Wells and counsel's law partner simultaneously represented two codefendants, one of whom was called as a witness for the state against Petitioner. Petitioner Wells has steadfastly maintained his innocence throughout the legal proceedings brought against him. An eyewitness placed the codefendant at the scene of the crime.

The advice of counsel and the state court judge placed an emphasis on a conflict of defenses, and the impairment of the ability to negotiate a plea bargain, the advice was actually misleading Petitioner Wells. The fact that there existed no conflict of defenses between Petitioner and codefendant Jerry Weeks was in fact evidence of the existence of the actual conflict of interest, because the codefendant was identified at the scene of the crime. The lack of an attempt by counsel to shift the blame to the codefendants, who were represented by the same law firm, is evidence of the conflict of interest that plagued the defense of Petitioner Wells. The trial judge

occupied the sole position available through which the due process rights of Petitioner Wells could have been protected by a timely disqualification of counsel.

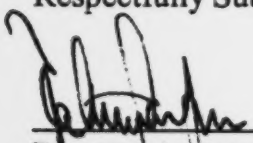
The state courts below and the United States Court of Appeals for the Eleventh Circuit have decided an important issue that has not been previously settled by the Court, that disqualification is not mandatory even if the fundamental integrity of the trial is impugned. The courts below have sanctioned a purported waiver which has served only to defeat the search for the truth. The Supreme Court is now asked to elaborate on two of its prior holdings to address conflicts of interest which undermine the integrity of a criminal trial. In *Cuyler v. Sullivan, supra,* the Court held that a defendant who shows that a conflict of interest actually effected the adequacy of his legal representation need not demonstrate prejudice to obtain relief. *Id.*, 446 U.S. at 349-350, 1000 S.Ct. at 1719. The Court has also held that when an attorney's conflict may result

in either inadequate representation of the defendant, or would jeopardize the possibility of a fair verdict, the trial court has discretion to disqualify the attorney or to reject a purported waiver. *Wheat v. United States, supra,* 486 U.S. at 162-163, 108 S.Ct. at 1698-1699. A reasonable extension of the rule would require trial courts to disqualify counsel, and disregard a purported waiver, when it appears that the integrity of the trial will be undermined if the conflict of interest is allowed to continue. Petitioner Wells respectfully requests the Court issue a Writ of Certiorari so that the issue may be fully briefed on the merits.

I. CONCLUSION

Petitioner Wells would submit the Petition for Writ of Certiorari presents properly preserved issues decided by the United States Court of Appeals for the Eleventh Circuit contrary to precedent of the Court. It is respectfully submitted that the petition should be granted, and that the case proceed to briefing on the merits which relief is hereby requested.

Respectfully Submitted,



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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2000

LESTER L. WELLS,
Petitioner,

v.

MICHAEL W. MOORE, as Secretary of the
DEPARTMENT OF CORRECTIONS, State of Florida,
Respondent.

Appendix to
Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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COUNSEL FOR PETITIONER

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United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

March 28, 2001

MEMORANDUM TO COUNSEL OR PARTIES

RE: 00-12781-HH Lester L. Wells v. Michael W. Moore
DC DKT No.: 97-00243 CV-5-RV-MD

Order entered. Petition for rehearing is denied.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-12781

D. C. Docket No. 97-00243-CV-5-RV-MD

LESTER L. WELLS,

Petitioner-Appellant,

versus

MICHAEL W. MOORE,
ROBERT BUTTERWORTH,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(February 14, 2001)

Before BLACK, RONEY and HILL, Circuit Judges.

PER CURIAM:

Appellant Lester L. Wells filed a petition in federal court for habeas relief pursuant to 28 U.S.C. § 2254. Following a report and recommendation from the magistrate judge, the district court denied relief, dismissed the suit, and certified the following limited issues for appeal: "(1) whether [Appellant] was denied his constitutional right to effective assistance of counsel due to a conflict of interest based on dual representation of co-defendants by the same law firm, as in *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), and (2) whether [Appellant] was denied his constitutional right to effective assistance of counsel due to a conflict of interest based on the law firm's prior representation of an adverse witness, as in *United States v. Martinez*, 630 F.2d 361 (5th Cir. 1980)."

We have reviewed the record and hard oral arguments in this case. We conclude the district court did not err when it adopted the magistrate judge's report and recommendation, which was thorough and accurate. Appellant knowingly, voluntarily, and intelligently waived the alleged conflicts of

counsel resulting from (1) the paired representation of co-defendants and (2) the representation of a prosecution witness by counsel's law firm.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

LESTER L. WELLS
Petitioner,

vs. 5:97cv243/RV/MD

MICHAEL W. MOORE,
Respondent.
_____/

CERTIFICATE OF APPEALABILITY

This cause is before the court on petitioner's motion for a certificate of appealability of the denial of 28 U.S.C. § 2254 relief (doc. 29). Unless a certificate of appealability is issued, the petitioner may not take an appeal from the final order denying Section 2254 relief. See 28 U.S.C. 2253(c)(1)(B). Such a certificate may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). If a certificate issues it must indicate the issue or issues which satisfy this standard. § 2253(c)(3).

The standard for granting a certificate of appealability

is "materially identical" to the pre-AEDPA standard for granting a certificate of probable cause. Hardwick v. Singletary, 126 F.3d 1312, 1313 (11th Cir. 1997) (*citing* 28 U.S.C. § 2253(c)(2) *and* Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983)). The Court in Barefoot found the following statement "cogently sums up this standard:"

> "In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'"

Id., n.4 (citations omitted); *see also*, Weeks v. Jones, 52 F.3d 1559, 1574 (11th Cir. 1995), *cert denied*, 514 U.S. 1104 (1995) (*quoting* Barefoot); United States v. Rocha, 109 F.3d 225, 227 n.2 (5th Cir. 1997).

This court's order denying relief adopted the

recommendation of the magistrate judge over objection by the defendant. Upon a review of the file, including the objection raised by the defendant, it appears that a certificate of appealability should issue on the following limited issues: (1) whether petitioner was denied his constitutional right to effective assistance of counsel due to a conflict of interest based on dual representation of co-defendants by the same law firm, as in *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), and (2) whether petitioner was denied his constitutional right to effective assistance of counsel due to a conflict of interest based on the law firm's prior representation of an adverse witness, as in *United States v. Martinez*, 630 F.2d 361 (5th Cir. 1980). Based on the facts of this case, these issues which are debatable among jurists of reason, could be resolved in a different manner, and are adequate to deserve encouragement to proceed further. The other issues raised do not warrant a certificate of appealability.

It is therefore ORDERED:

Defendant's request for a certificate of appealability is GRANTED and a certificate of appealability is hereby issued for the reasons set forth above.

DONE AND ORDERED this 12th day of July, 2000.

/s/ Roger Vinson
ROGER VINSON
CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

LESTER L. WELLS,
Petitioner,

vs. 5:97cv243/RV/MD

MICHAEL W. MOORE,
Respondent.
_____/

ORDER

This cause comes on for consideration upon the magistrate judge's report and recommendation dated February 29, 2000. The petitioner has been furnished a copy of the report and recommendation and has been afforded an opportunity to file objections pursuant to Title 28, United States Code, Section 636(b)(1), and I have made a de novo determination of those portions to which an objection has been made.

Having considered the report and recommendation and all objections thereto timely filed, I have determined that the report and recommendation should be adopted.

Accordingly, it is now ORDERED as follows:

1. The magistrate judge's report and recommendation is adopted and incorporated by reference in this order.

2. The petition for writ of habeas corpus (doc. 1) challenging the convictions and sentences in *State v. Lester L. Wells and Jerry Wayne Weeks*, case no. 83-I-534 in the Circuit Court of Santa Rosa County, Florida, is DENIED, this action is DISMISSED, and the clerk is directed to close the file.

DONE AND ORDERED this 28th day of April, 2000.

/s/ Roger Vinson
ROGER VINSON
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

LESTER L. WELLS,
Petitioner,

vs. 5:97cv243/RV/MD

MICHAEL W. MOORE
Respondent.

REPORT AND RECOMMENDATION

Before the court is a petition for writ of habeas corpus filed pursuant to Title 28 U.S.C. § 2254 (doc. 1). Respondent has filed a response (doc. 9), to which petitioner has replied (doc. 13). The matter is referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(B). After careful consideration of all issues raised by petitioner, it is the opinion of the undersigned that no evidentiary hearing is required for the disposition of this matter, Rules Governing Section 2254 Cases 8(a). It is further the opinion of the undersigned that the

pleadings and attachments before the court show that petitioner is not entitled to relief, and that the petitioner is without merit and should be denied.

BACKGROUND

Petitioner and co-defendant Jerry Wayne Weeks[2] believed that James Wyche and his son, Billy Wyche, had stolen marijuana from them and, in retaliation, allegedly kidnapped Billy Wyche, bound him, locked him in an automobile trunk and pushed the automobile into a river. Wyche survived. In September 1983, petitioner and Weeks were charged in kidnapping, pleaded not guilty and were released on bond. The Wyches were thus key potential witnesses on the charge.

On November 10, 1983, while petitioner and his co-defendant were out on bond, James and Billy Wyche, accompanied by their friend, Phillip Wayne Enfinger, began

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[2]Petitioner and Jerry Wayne Weeks are cousins.

their annual week long hunting and fishing trip. Mr. Enfinger launched his two 12-foot aluminum boats, each loaded with gear and attached to each other by a rope, into the Escambia River and proceeded toward the camp house. As he approached the camp house and was deciding where to land, the Wyches passed him and landed their boat on the bank by some willow trees. James Wyche got out of the boat, gathered camping equipment and started toward the camp house. At that point, Mr. Enfinger heard James Wyche say something that sounded like "They are here" or "Get out of here." Mr. Enfinger turned his boat around in an attempt to escape. Shots were fired and Mr. Enfinger was shot out of his boat. He surfaced and held on to his second boat, which floated across the river. He did not see the Wyches, but did see petitioner and co-defendant Wells on the other side of the river shooting. He believed that they were looking in his direction but could not see him because the

camping gear on his boat obstructed their vision.[3] After the shooting ceased, Mr. Enfinger floated to the other side of the river and made it back to the landing area. James Wyche was found dead at the scene. Billy Wyche's body was found downstream the next day where his life jacket had snagged on an underwater branch. Mr. Enfinger survived his injuries and testified at the trial that he had known petitioner and Weeks approximately twenty years and that he was absolutely positive they were the shooters.

PROCEDURAL HISTORY

In November, 1983, petitioner and Jerry Wayne Weeks ("Weeks") were indicted in the Circuit Court of Santa Rosa County, Florida on two counts of first degree murder and one count of attempted first degree murder.[4] The first trial ended in

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[3]Mr. Enfinger testified that during the incident petitioner and Weeks were walking up and down the beach and he therefore had an opportunity to observe not only their faces, but also their physical builds, their profiles and the way they walked and carried themselves.

[4]After the murders, the kidnapping charges were nolle prossed.

a mistrial, prior to being submitted to the jury. In the second trial, petitioner and Weeks were convicted as charged. On appeal the First District Court of Appeal of Florida ruled that: 1) a taped statement of Billy Wyche that he and his father had stolen marijuana from Weeks and Wells and that they had kidnapped and attempted to murder him was inadmissible hearsay, and 2) admission of records of ammunition purchases and a truck purchased by Weeks' father and brother, and of a boat registered by Weeks' brother, deprived defendants of a fair trial.[5] The convictions were reversed and the case remanded for a new trial. *Wells v. State,* 492 So.2d 712 (Fla. 1st DCA 1986), Rev. Den. 501 So.2d 1283 (Fla. 1986).

Petitioner and Jerry Wayne Weeks were re-tried in a joint trial and were represented by Mr. Jimmy Judkins and Mr.

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[5]Jerry Wayne Weeks' father, Wilber Weeks ("father"), and brother, Anthony Weeks (brother), were convicted in a separate trial on two counts of manslaughter and one count of attempted manslaughter for their role in allegedly supplying the truck, boat, guns and ammunition used in the crime. These convictions were reversed for insufficient evidence to support the convictions. The appellate court order the trial court to vacate the judgments and sentences and to dismiss the charges. *Weeks v. State*, 492 So.2d 719 (Fla. 1st DCA 1986.)

Larry Simpson, partners in the same law firm. Petitioner testified in his own behalf and called supporting witnesses, but Weeks did not testify or put on any evidence. Both were convicted as charged. Petitioner was sentenced to life imprisonment without parole for 25 years on each count of first degree murder, to be served consecutively, and ten years imprisonment, concurrent, on the conviction of attempted first degree murder.[6] The convictions and sentences were affirmed on appeal on March 28, 1989. *Weeks v. State*, 541 So.2d 1176 (1st DCA 1989).

On April 9, 1991 petitioner filed a motion for post-conviction relief pursuant to Rule 3.850, Fla. R. Crim. P., which was denied without prejudice because of an improper oath. Petitioner filed an amended post-conviction relief motion on May 13, 1991 (doc. 9, exh C)[7], a second amended motion on

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[6]Co-defendant Jerry Wayne Weeks received the same sentence.

[7]The Court found the amended motions were not procedurally barred under the two year statute of limitations rule of 3.850(b).

October 23, 1992 and a third amended motion on January 12, 1993. The following issues were raised in the 3.850 motions:

1. Conflict of interest.
2. Ineffective assistance of counsel

   (a) Failure to object to cross-examination of alibi witness.
   (b) Failure to object to improper prosecutorial comments during closing.
   (c) Failure to request jury view of murder site.
   (d) Failure to properly investigate and/or present evidence of distance between the eyewitness and the perpetrators.

3. Ineffective assistance of appellate counsel.
4. Prosecution failed to disclose favorable evidence.
5. Newly discovered evidence on the ground that the eyewitness recanted his testimony.

An evidentiary hearing encompassing four days was held on January 29, 1993, February 13, 1993, March 19, 1993 and April 1, 1993. On September 28, 1994 the court denied the post-conviction relief motion. Petitioner filed a motion for rehearing on October 12, 1994, which was denied on October 19, 1994. Petitioner appealed and the trial court's ruling was upheld by

the First District Court of Appeal. A motion for rehearing was filed on August 9, 1996 and denied on September 23, 1996. *Weeks v. State,* 679 So. 2d 779 (Fla. 1st DCA 1996).

In this federal habeas corpus petition, petitioner alleges ineffective assistance of counsel based on conflict of interest.

Section 2254 Review

Section 2254(a) of Title 28 provides that "a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court" upon a showing that his custody is in violation of the Constitution or laws of the United States. As the instant petition was filed after April 24, 1996, it is subject to the more deferential standard for habeas review mandated by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub.L. 104-132, § 104, 110 Stat. 1214, 1218-19. In relevant part, section 2254(d) now provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be

> granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A § 2254 (West Supp. 1997).

Review under § 2254(d) requires this court first, to ascertain the applicable federal law that was "clearly established" by the United States Supreme Court at the time of the state court's adjudication, and second, to determine whether the state court's adjudication was contrary to that clearly established law. If the state court applied the correct law, but the facts of the instant case are not substantially similar to the prevailing Supreme Court precedent, this court must thirdly determine whether the state court "unreasonably applied the

relevant Supreme Court authority," The writ will issue only if "it is not debatable among reasonable jurists that the result of which the petitioner complains is incorrect." Deference must be given to the state court ruling. *Neelley v. Nagle,* 119 S.Ct. 811, 142 L.Ed.2d 671 (1999).

A conflict of interest claim presents a mixed question of law and fact subject to de novo review. *Freund v. Butterworth*, 165 F.3d 839, 862 (11th Cir. 1999). Mixed questions of law and fact are not entitled to a presumption of correctness under § 2254(d). *Id. See also Perillo v. Johnson* 79 F.3d 441, 446 (5th Cir. 1996). However, any factual findings made by the state court when deciding the conflict issue are subject the deferential standard of § 2254(d)(2). *Perillo* at 446.

Supreme Court Law

In order to prevail upon a claim of ineffective assistance of counsel, the petitioner must prove that: (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In applying this test, "reviewing courts must indulge a strong presumption that counsel's conduct fell within the wide range of reasonably professional assistance." *Yordan v. Dugger*, 909 F.2d 474, 477 (11th Cir. 1990)(citing *Harich v. Dugger,* 844, F2d 1464, 1469 (11th Cir. 1988); *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989)("emphasizing that petitioner was 'not entitled to error-free representation'"). In determining whether counsel's conduct was deficient, courts must, with much deference consider "whether counsel's assistance was reasonable considering all the circumstances." *Strickland*, 466 U.S. at 688; see *Atkins v. Singletary,* 965 F.3d 952 (11th Cir. 1992). Counsel's performance is presumed to have been reasonable and adequate. *Strickland,* 466 U.S. at 688.

However, in cases involving conflict of interest, the

court applies the more lenient standard articulated by the Supreme Court in *Cuyler v. Sullivan,* 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980), rather than that of *Strickland.* Under *Cuyler*, petitioner must "establish that an actual conflict of interest adversely affected his lawyer's performance." *Id.* If petitioner establishes both the actual conflict and adverse effect prongs of the *Cuyler* test, he need not demonstrate "prejudice" as that element is used in the *Strickland* test to determine ineffective assistance of counsel, i.e. that the result of the trial would have been different. Prejudice is presumed. See, e.g. *Buenoano v. Singletary*, 74 F3d 1078 (11th Cir. 1996); *Porter v. Singletary*, 14 F3d 554, 560 (11th Cir.), cert. denied, 115 S.Ct. At 1719. Thus, this Court must determine whether an actual conflict existed and, if so, whether the actual conflict had an adverse effect on counsel's representation.

While petitioner need not prove that eradicating the conflict would have necessarily changed the result of the trial,

he must show that the conflict adversely affected counsel's representation. *Cuyler*, 446 U.S. at 350, 100 S.Ct. At 1719; *Buenoano,* 74 F.3d at 1086. To demonstrate an actual conflict, petitioner "must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence" that favors an interest in competition with that of the defendant. *Smith v. White,* 815 F.2d 1404, 1404 (11th Cir.), cert. denied, 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 133 (1987). "If [the attorney] did not make such a choice, the conflict remained hypothetical." *Buenoano,* 74 F.3d at 1086 (*quoting Smith,* 815 F.2d at 1404). A significant divergence in the interests of the co-defendants must have existed, and the defense or strategy obstructed by the conflict must have been plausible and viable. *United States v. Benavidez*, 664 F.2d 1255 (5th Cir.), cert. denied, 457 U.S. 1135, 102 S.Ct. 2963, 73 L.Ed.2d 1352 (1982); *Foxworth v. Wainwright*, 516 F.2d 1072 (5th Cir.

1975). Thus, petitioner must point to evidence or arguments that counsel was prevented from presenting or such preclusion must be evident from the record. See *United States v. Mers*, 701 F.2d 1321, 1331 (11th Cir. 1983) (quoting *Benavidez, supra*).

DISCUSSION

Petitioner contends that there were two types of conflicts in this case. The first one was caused by multiple representation by the same law firm, as in *United States v. Garcia,* 517 F.2d 272 (5th Cir. 1975). The alleged *Garcia* conflict in the instant case was between petitioner and Jerry Wayne Weeks. The second type of conflict is the *Martinez*[8] conflict, in which the cross-examination of a witness is restricted due to the attorney's prior representation of that witness. The alleged *Martinez* conflict in the instant case arose because of the prior representation of Anthony Weeks by Larry

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[8] *United States v. Martinez*, 630 F.2d 361 (5th Cir. 1980).

Simpson and of Wilbur Weeks by Jimmy Judkins in the separate manslaughter trial.

In the following discussion it will be shown that there was at most only a possible conflict; that there was an effective waiver of any conflict; that there was in fact no actual conflict; and that even if there were an actual conflict, it did not adversely affect the adequacy of petitioner's legal representation.

WAIVER

The right to conflict-free counsel is an extension of the Sixth Amendment right to counsel. *Glasser v. United States,* 62 S.Ct. 457 (1942). This constitutional right may be waived, however. *United States v. Garcia,* 517 F.2d 272, 276 (5th Cir. 1975). If the waiver is valid, a defendant cannot later attack his conviction on the basis of conflict of interest. *United States v. Cirrincione*, 780 F.2d 620, 624 (7th Cir. 1985). See also *United States v. Flanagan*, 679 F.2d 1072 (3rd Cir. 1982); *United States v. Gaines*, 529 F.2d 1038 (7th Cir. 1976).

The standard for determining a defendant's voluntariness and knowledge of the consequences of his waiver of conflict-free counsel is set forth in *Garcia*, *supra*.

> [T]he district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interests and the potential perils of such conflicts, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections.

On January 29, 1985, after the second trial and during the appeal, an "Authorization to Represent & Waiver of Conflict" was signed by Weeks' father and brother and by petitioner. This waiver stated that Mr. Simpson represented Weeks and his brother while his law partner, Mr. Judkins, represented Lester Wells and Weeks' father. Doc. 17, exh. L,

p. 978.[9] On September 11, 1986, before the third trial, another waiver of conflict was signed by all four parties. Doc. 17 exh. L, pp. 485, 981. The trial court, as will be discussed more fully below, determined before the trial that these waivers were valid. Doc. 9, exh. F, p. 277. The finding was upheld in the state court's order denying post-conviction relief. Doc. 9, exh. H.

> 5. Petitioner claims that the record does not reflect a voluntary waiver and that the state court's decision that the conflicts were waived is contrary to the controlling Supreme Court standard that to be valid a waiver must be an "intentional relinquishment or abandonment of a known right", *Johnson v. Zerbst*, 304 458, 58 S.Ct. S. 1018, 82 L.Ed. 1461 (1938), and a "knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747, 756 (1970). The court will consider the waivers in terms of the alleged conflicts.

<u>*Garcia* Conflict (Jerry Wayne Weeks)</u>

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[9]A joint rule 3.850 evidentiary hearing was held for Lester Wells and Jerry Wayne Weeks. The transcripts of this hearing have been filed in *Weeks v. Moore,* 3:99cv156/RV as an attachment to document 17. The transcript of the trial has also been filed in that case as an attachment to document 17. Hereinafter all references to document 17 are from case number 3:99cv156.

Petitioner argues that a Garcia conflict existed because under the joint defense strategy, Weeks had to be acquitted in order for petitioner to be acquitted. At the first trial in 1984, which ended in a mistrial, petitioner and Weeks were represented by Attorneys from the same law firm, James Burke and Don Dewrell. When the issue of conflict arose, the defendants at first agreed to waive any conflict. After an adverse ruling regarding opening and closing statements, however, Weeks' attorney, Don Dewrell, asked that he be allowed to withdraw from any further representation of Weeks. The prosecutor agreed and stipulated to the withdrawal of Mr. Dewrell and to the mistrial, stating that he agreed that the interests of the defendant were competing. Doc. 9, exh. F, p. 7. At the second trial, petitioner and Weeks were represented by independent counsel. At the third trial, the conviction which is being challenged by the instant petition, petitioner and Weeks were again represented by partners in the same law firm.

Prior to the trial, The Honorable Clyde Wells held a

conflict hearing to determine if the parties were aware of the potential conflict of interest in being represented by members of the same firm. The following colloquy took place:

> THE COURT: Okay. Let the record reflect that the defendants Jerry Wayne Weeks and Lester Wells are present in court and the Court is here at this point-consider the defendants' motion to waive any potential conflict that exists by virtue of Jimmy Judkins and Larry Simpson representing each of the two defendants individually. The way that's set up, let's say Jimmy Judkins, you're representing Lester Wells, and Larry Simpson is representing Jerry Wayne Weeks. Jimmy Judkins and Larry Simpson are in the same law firm and because of that the Court recognizes a potential conflict of interest in them representing the two defendants. The purpose of this hearing, and I'm talking to the defendants now, is to give you the opportunity to waive any potential conflict of interest the lawyers have in taking on the representation of the two of you. Before that can proceed it's necessary that you waive on the record, and I think we had you do this in Milton a couple or three years ago when Don Dewrell and his partner was (sic) representing both of you. Is that fairly stated, what the purpose is that we're here today?
>
> MR. JUDKINS: Yes, sir.
>
> THE COURT: Do you understand what I have

said, Lester, and the potential for conflict that exists with the attorneys?

MR. WELLS: Yes sir.

THE COURT: Do y'all think I need to put them under oath for the purpose of this?

MR. EDGAR: I would request it.
(Lester Wells and Jerry Wayne Weeks are sworn)
THE COURT: Lester, you indicated you understand what I said and the potential for conflict that exists between the two lawyers.

MR. WELLS: Yes sir.

THE COURT: And do you, in accepting the representation of Mr. Judkins, recognize that potential and waive any potential conflict that might exists in this case

MR. WELLS: Yes, sir.

THE COURT: And you have gone into that with Mr. Judkins at some depth; is that correct?

MR. WELLS: Yes, sir.

THE COURT: And you have thought about this over a considerable period of time.

MR. WELLS: Yes, sir.

THE COURT: And, Jerry Wayne Weeks, are

you aware of this potential for conflict?

MR. WEEKS: Yes, sir, I waive it.

THE COURT: And each of you understand that if you get convicted of this crime and get a lengthy jail term that the standard practice of people who are serving time in prison after they have exhausted all of their other appellate remedies is to come back and petition the Court saying that their counsel was incompetent because of conflict of interest. Do you understand that you're waiving any potential conflict, not just today but down the road, five years or ten years from now. Do you understand that?

MR. WELLS: Yes, sir.

THE COURT: And you agree to that?

MR. WEEKS: Yes, sir.

THE COURT: And each of you feel like you're in control of all of the facts necessary for you to make an intelligent decision?

MR. WELLS: Yes, sir.

THE COURT: And neither of you have been influenced in making that decision by any threats, pressure, coercion or anything of that nature?

MR. WELLS: No, Sir.

MR. WEEKS: No, sir.

THE COURT: Do you gentlemen have anything else to [sic] you want to put in regard to that?[10]

Judge Wells found the waivers to be valid. But petitioner argues that the record does not reflect a voluntary, knowing wavier [sic] and that the waiver was not explained to him by conflict-free counsel. He contends that the court did not "elicit a narrative response" from petitioner as required by *Garcia*. Further, the court failed to inform him of his rights to obtain or confer with conflict-free counsel. See *United States v. Petz*, 764 F.2d 1390 (11th Cir. 1985) (invalid waiver where defendant not informed that he had right to consult with or obtain independent counsel).

Petitioner testified at the evidentiary hearing on his 3.850 motion that he signed a waiver dated September 11, 1986 only because his attorneys told him that he must do so in order for them to represent him. He states that he does not remember reading the waiver, that it was not explained to him and that he was not told that

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[10]At that point Mr. Edgar, the prosecutor, asked the court to inquire as to the possible conflict between Lester Wells, Jerry Wayne Weeks, Wilbur Weeks and Anthony Weeks. This will be discussed later in terms of the *Martinez* conflict.

once the waiver was signed, he could not pursue a plea bargain, could not pursue a "blame-shifting" defense and that cross-examination of some witnesses would be limited. Doc 17, exh. L, pp. 485-486.

Although petitioner claims that he was never informed that because of joint representation by the same firm, his counsel could not pursue a plea bargain in exchange for his testimony against his co-defendant, petitioner received a letter from his counsel prior to the second trial, specifically stating that plea bargains could not be pursued on his behalf because of a potential conflict of interest. Doc. 17, exh. L., pp. 946-947. Furthermore, at the 3.850 evidentiary hearing, Mr. Judkins testified that he had discussed the issue of conflict with petitioner on several occasions. The first time was in a letter delivered to petitioner when he was in jail. After the second trial when Mr. Judkins' partner, Mr. Simpson, assumed representation of one of petitioner's alleged co-conspirators, Weeks' brother, there ensued another discussion of conflict of interest, with petitioner and Weeks' brother both signing waivers of conflict. When petitioner's case was remanded after appeal, Mr. Simpson then

represented co-defendant Weeks. At that time another discussion regarding conflict of interest was held between the attorneys and their respective clients. Waivers of conflict were again signed. Doc. 17, exh. L, pp. 976-986.

Applying the *Garcia* standard in habeas cases, the court must consider whether the defendant:

> (1) was aware that a conflict of interest existed; (2) realized the consequences to his defense that continuing with counsel under the onus of conflict could have; and (3) was aware of his right to obtain other counsel.

Gray v. Estelle, 616 F.2d 801, 804 (5th Cir, 1980) *quoting Zuck v. State of Alabama,* 588 F.2d 436, 440 (5th Cir. 1979). It is enough that the defendant knows the types of risks at stake and acts "with open eyes." *United States v. Roth,* 860 F.2d 1382, 1388-89 (7th Cir. 1988).

Mr. Judkins testified that it was his belief that petitioner was aware of the potential conflict and wanted him to continue as counsel, otherwise he would have withdrawn from the case. Doc. 17, exh. L, p. 968. Mr. Judkins also testified that he was sure that he had told each defendant that they all had the right to individual

representation, that they could exercise that right or they could have dual representation. Doc. 17, exh. L, p. 1012. He stated that at the time of the hearing, because there was no state case law requiring the judge to make an independent inquiry, they asked the judge to apply the federal court procedures for conflict determination in their state court case. Judge Wells did not make as thorough an inquiry as Mr. Judkins would have liked, however. Doc 17, exh. L., p. 1030. But, according to Mr. Judkins, petitioner knew that Mr. Judkins could not represent him without a wavier [sic] of conflict and he had an opportunity to have Mr. Judkins withdraw as his counsel. Doc. 17, exh. L, p, [sic] 1037.

Although petitioner's answers were not in narrative form, "mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver." *Garcia* at 278. Petitioner indicated that he understood the risk of the potential conflict, that he had the rational capacity to waive the potential conflict of interest and that he chose to do so. The co-defendants agreed that they recognized that a potential conflict existed, and having discussed the matter with their attorneys, waived that conflict.

They also agreed that the decision was intelligently made and that they had not been influenced in any way in making the decision. When questioned by the prosecutor whether they felt there was nay conflict or antagonism between the two of them or between their respective counsel they stated that there was on. Under such circumstances, a waiver is considered to be knowing and intelligent. *United States v. Curcio*, 694 F.2d 14, 26 (2nd Cir. 1982). Mr. Judkins testified that at the conclusion of the conflict of interest hearing conducted by Judge Wells, he believed that any potential conflict of interest had been waived and that he had tried to counsel petitioner regarding that issue sufficiently to prevent it from being raised in post-conviction relief proceedings later on. Doc. 17, exh. L, pp. 944-946.

In holding that if an actual conflict of interest existed it had been waived, the trial court, in denying petitioner's post-conviction relief motion, explained that petitioner and his co-defendant were aware of the conflict of interest since it had been raised in the first trial. Doc. 9, exh. H, pp. 7-8. Petitioner argues that despite the brief discussion on conflict of interest in the first trial, he was still not on

notice of his right to conflict-free counsel because it was not explained to him by attorney, Don Dewrell. However, petitioner was represented by James Burke, Jr., [11] not Don Dewrell. Further, when the court refused to allow petitioner and his co-defendant to have separate opening statements, closing arguments or cross-examination of witnesses in the first trial, Mr. Dewrell moved for a mistrial, stating as follows:

> MR. DEWRELL: Judge, based upon my full understanding of the court's ruling, I have discussed this matter with Mr. Weeks and Mr. Burke has discussed it with Mr. Wells and we've both discussed it with both of them and it's their opinion to that due to the seriousness of the case that they will avail themselves of their right to totally conflict-free individual representations. Not only as to the defense, but as to the procedural aspects of the trial. And, so, consequently, that being the case, Your Honor, I have no alternative but to ask the Court to allow us to withdraw and to declare a mistrial and reset the case for trial.

Doc. 9, exh. F, p. 269. At the 3.850 evidentiary hearing petitioner testified that Judge Wells told them, after the mistrial,

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[11]Mr. Burke was an associate in Mr. Dewrell's law firm.

that they would have to have independent counsel. Doc 17, exh. L, p. 572.

Before the third trial began, Judge Wells recused himself from the case and was replaced by The Honorable Carl Harper. Prior to trial, Judge Harper addressed the waiver issue. Judge Harper agreed with Judge Wells' ruling that the conflict of interest had been knowingly and voluntarily waived. Doc. 17, exh. L, p. 945; exh. A, pp. 1793-1797. Mr. Judkins later testified at the 3.850 evidentiary hearing, that at the conclusion of the pre-trial hearing, he was satisfied that petitioner understood the potential conflict of interest and had waived it. Doc 17, exh. L, p. 945.

Petitioner complains that Judge Harper simply conduct an "abbreviated" hearing regarding the conflict issue, which merely adopted Judge Wells' finding. Prior to trial, Mr. Judkins, Mr. Simpson, Mr. Edgar and Judge Harper agreed that because the matter had already been heard and ruled upon by Judge Wells, there was no need for Judge Harper to consider it.

But, for the record, Judge Harper did state that he had read the transcript of the hearing held before Judge Wells. Petitioner and his co-defendant as to whether there had been any change in circumstances since the conflict hearing conducted by Judge Wells and each replied that there had been no change.[12] The court then questioned each defendant as to whether there was nay objection to being represented by members of the same law firm and each stated that there was no objection. Doc 17, exh. A, pp. 1793-1797.

Whether a wavier [sic] has been intelligent and knowing depends "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." *Cirrincione, supra* at 624, *quoting Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82

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[12]Petitioner now claims that there had been major changes because the law firm represented two individuals who had been identified as being at the scene of the murders, Weeks and his father, and, at the same time, represented petitioner, whom they knew to be actually innocent. However, the attorneys were aware of petitioner's alleged innocence, and the joint representation of all co-defendants happened before the waiver hearing before Judge Wells. Therefore these facts did not constitute "major changes" in circumstances at the time of the hearing conducted by Judge Harper.

L.Ed. 1461 (1938). This is not the first time petitioner was faced with considering the issue of conflict of interest. As discussed earlier, the issue arose at the first trial in 1984 and petitioner agreed to waive any conflict of interest in that instance as well. Therefore petitioner was familiar with the pitfalls of a potential conflict of interest and had plenty of time between the time the issue first arose in 1984 until the two waiver hearings in 1987 to consider the ramifications of his decision to waive potential conflict of interest and retain the counsel of his choosing.

One other point bears mention. The state argued at the 3.850 motion hearing that although the two defendants had independent counsel in the second trial, the tactics used in the third trial essentially mirrored those of the second. The primary difference either party points to is that petitioner did not testify at the second trial but did at the third.[13] Petitioner makes no

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[13]The only other difference si that fewer alibi witnesses were called on petitioner's behalf. His attorney explained at the 3.850 hearing that he was concerned about discrepancies in the witnesses' testimony, particularly since they

compelling argument that this difference was in any way impacted by the alleged conflict, nor can this court imagine any. What is left, then, is petitioner's argument that independent counsel at the third trial would have tried the case differently than those at the second. This reasoning falls of its own weight.

The finding of fact by the trial court at the 3.850 hearing that there were effective waivers was supported by the evidence. It is therefore entitled to deference. Moreover, the trial court did not err in applying the facts to relevant federal authority. Therefore the trial court did not err in finding the waiver to be valid in terms of a potential *Garcia* conflict.

Martinez Conflict (Wilbur and Anthony Weeks)

Petitioner next claims that the trial court's holding that if an actual conflict of interest existed it was waived by petitioner and based on an unreasonable determination of the facts because the court did not take into consideration the

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were family members. Doc. 17, exh. L, pp. 528-520, 1031. Although petitioner raised this issue in his 3.850 motion, he has not raised it in this federal habeas proceeding.

Martinez conflict of the same law firm representing an adverse witness. An actual conflict of interest may exist when an attorney cross examines a former client. *Porter v. Singletary,* 14 F.3d 554 (11th Cir. 1994). Absent a wavier [sic], the prior representation may prevent the attorney from inquiring into privileged matters. *U.S. v. Lussier,* 71 F.3d 456, 461-62 (2nd Cir. 1995).

In May of 1984 Mr. Judkins sent a letter to petitioner and Weeks' father warning them of a potential conflict of interest.[14] Waivers regarding this conflict were signed by all defendants on January 29, 1985 and September 11, 1986. Doc. 17, exh. L, pp. 978, 981. Weeks' brother was called as a state witness and testified that he owned the truck and the boat that were identified as being used by the person committing the crime and that these vehicles were stored in his father's barn.

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[14]The letter states in part: "As we discussed there is potential conflict of interest in our representation of both of you since I am sure that the prosecution would plea bargain with either of you in exchange for testimony against each other and against [Jerry] Wayne and Anthony Weeks." Weeks Doc. 17, exh. L. p. 946. At this time the firm was not representing either Jerry Wayne Weeks or Anthony Weeks.

Weeks' father did not testify.

At the pre-trial hearing conducted by Judge Wells prior to the third trial, the prosecutor inquired of the co-defendants whether they understood that cross-examination of Weeks' father and brother by their attorneys could be limited due to the prior representation of these individuals by their attorneys. Petitioner and Jerry Wayne Weeks stated that they understood and waived any limitations on cross-examination. Doc. 9, exh. F. pp. 14-15.[15]

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[15]THE COURT: Do you gentleman have anything else that you want to put on in regard to that?

MR. EDGAR: I do, Your Honor. I would like to inquire of the defendants as to whether or not they understand that in a trial of this case that it's possible that the state may call as witnesses against them Wilbur Weeks or Anthony Weeks and that these gentleman have represented them and have had confidential communications with them.

THE COURT: Jimmy Judkins has, not Larry Simpson except through his being in the same firm.

MR. EDGAR: Did you represent -

MR. SIMPSON: I represented Anthony on appeal.

MR. EDGAR: But you represented him. They understood that because of that that their counsel in this case may not be able to cross examine fully because their clients may claim the communications

between them were privileged and at some point they might not get a full measure of counsel because of that, and that they understood that and are willing to proceed.

THE COURT: Do each of you understand that because of Mr. Judkins and Mr. Simpson having represented Lester Wells and Anthony - excuse Mr. Wilbur Weeks and Anthony Weeks, that if the Weeks claim attorney client privilege that they may be limited in their cross examination of them if the state calls them as a witness?

MR. WELLS: Yes, sir. I fully understand it.

MR. WEEKS: Yes, sir.

THE COURT: And you waive any limitation on the examination?

MR. WELLS: Yes, sir.

MR. EDGAR: One other matter, Your Honor. I would inquire of the defendants as to whether or not hey feel that there is any conflict or antagonism between them being represented by the same firm. In order words, do they feel there is any at all? We've asked them if they waived any. I would like to inquire if they feel there is any conflict or antagonism between the two of them or between the lawyers representing them?

THE COURT: Do you understand the question?

MR. WELLS: Yes, sir. I don't see any conflict whatsoever.

MR. WEEKS: I don't either, none at all.

MR. EDGAR: No antagonism at all?

MR. WELLS: No, sir.

MR. EDGAR: You're united in your efforts?

MR. SIMPSON: Well, don't answer any more questions of Mr. Edgar.

MR. EDGAR: If they feel they're united in their defense or divisive or at odds with each, Your Honor, if one might inquire along those lines.

Petitioner's answers at the pre-trial waiver hearing indicate that he fully understood the nature and consequences of the waiver. Also, in the order denying post-conviction relief, the state court did note that the conflict issue was discussed when Mr. Simpson began representation of Weeks and his brother and that all four defendants waived any conflict. Doc. 9, exh. L, p. 1618. Therefore in ruling on the 3.850 motion, the court did consider the *Martinez* conflict and agreed with the trial court that it was a valid waiver. Again, the trial court appropriately applied the facts to applicable federal law, and there was no constitutional error.

CONFLICT

MR. JUDKINS: Judge, if there are any other questions that need to be asked, we would ask that the Court take them up in camera without Mr. Edgar's presence.

MR. EDGAR: I object to that unless there's some authority.

THE COURT: I'm not going to take nay in camera. I think I have sufficiently covered any 3.850 motion that might be filed. I would all y'all to proceed to represent each of these defendants.

Doc. 9, exh. F, pp. 276-277.

Even if the waivers were inadequate, ineffective assistance of counsel does not exists unless there was either (1) potential conflict that resulted in prejudice to defendant or (2) actual conflict that adversely affected counsel's performance. *U.S. v. Lussier,* 71, F.3d 456, 463 (2nd Cir. 1995).

Potential Conflict

If there are no objections at trial to a conflict of interest, then the defendant must show an actual conflict of interest. *Cuyler*, 446 U.S. at 338, 100 S.Ct. at 1708; *Mills v. Singletary*, 161 F.3d 1273 (11th Cir. 1998). In the instant case, petitioner not only did not object to the conflict, but agreed to waive it. However for the sake of completeness, the court will address petitioner's allegations of potential conflict of interest.

Burden Shifting Defense

A burden shifting defense is appropriate when one co-defendant wants in effect to admit his guilt but minimize his participation by placing the "burden" of the criminal act on his co-defendant. Mr. Judkins testified at the 3.850 hearing that the

was convinced that petitioner was innocent and that petitioner had no testimony to offer that would be harmful to others. Furthermore, if he had thought the burden shifting defense was applicable, he would not have represented petitioner because there would have been an actual conflict of interest. Doc. 17, exh. L, pp. 947, 953. Finally, according to Mr. Judkins, there was no opportunity to utilize the burden shifting defense, given both defendant's denial of any knowledge of the murders, and for that reason it was not used at either trial, even when petitioner and co-defendant were represented by independent counsel.

Petitioner testified at the trial and at the 3.850 evidentiary hearing that he had no knowledge of who killed the Wyches. Doc. 17, exh. L, pp. 514-515. The trial court found that because petitioner's defense was that he had no knowledge of the crimes, this defense did not create a conflict. Because petitioner disavowed knowledge of the crime, there were no alternative defenses petitioner could have chosen, and counsel

was not forced to choose between alternative courses of action which would be damaging to the interest of one defendant and beneficial to the other. Therefore there was no conflict.

Petitioner argues, however that the opportunity existed to use the defense, but counsel did not utilize it because of a conflict caused by counsel's prior representation of Weeks and his father. According to petitioner's argument, counsel did not want to emphasize that weeks and his father had been identified as being at the crime scene, but that petitioner was not present.

Petitioner's defense was based on mistaken identity and his alibi witnesses. To bring out facts showing that either weeks or his father was at the scene would be to give credibility to the eyewitnesses who placed them at or near the scene. In order to do this petitioner would have to argue that the witnesses identification was correct as to his co-defendant but incorrect as to petitioner. Doc. 17, exh. L, p. 956. Regardless of who represented petitioner's co-defendants, it would have been counterproductive to insinuate that the identification as to

one was correct and incorrect as to the other. Doc. 17, exh. L, p. 965. Furthermore, petitioner maintained, and continues to maintain, his actual innocence. He could have attempted to shift the burden to Weeks by saying Weeks committed the murders, but to do so would have placed him at the site and implicated him in the crimes. This is absolutely inconsistent with petitioner's ongoing claims of ignornce of the crimes and innocence. Therefore the fact that petitioner and Weeks were represented by the same firm did not impede petitioner's ability to use the burden shifting defense.

Plea Bargain

While it is recognized that a conflict of interest may prevent an attorney from "exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution," *Thomas v. Foltz*, 818 F.2d 476, 481 (6th Cir. 1987), cert. denied, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987), *citing Baty v. Balkom*, 661 F. 2d 391 (Former 5th Cir. 1981), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2307, 73

L.Ed.2d 1308 (1972), there is no evidence in this record to suggest that counsel did not explore a negotiated plea for petitioner because of his concern over Weeks' interests.

At some point, petitioner was made a plea offer that in exchange for his testimony against Weeks he could plead to second degree murder. But since petitioner adamantly maintained that he had no knowledge of the crimes, he had no testimony to offer against Weeks and thus could not avail himself of the plea offer. Hence there was no conflict. Another plea offer was made that if petitioner passed a polygraph examination, the charges would be dropped.[16] Again, this would not create a conflict as to Weeks, his father or brother. Doc. 9, exh. H, p. 1616.

At the 3.850 evidentiary hearing, Mr. Judkins testified that even though is partner was representing petitioner's co-

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[16]Petitioner passed a polygraph test given by a polygraph examiner know to Mr. Judkins. Mr. Judkins then proposed to the state the petitioner be given another polygraph by a neutral examiner with the understanding that if he passed, the charges would be dropped and if he failed the results would be admitted into evidence. The state declined the offer. Doc. 17, exh. L, pp. 1003-1004.

defendant, he did not feel restrict in pursuing plea negotiations for petitioner because petitioner had informed him that he had no information regarding the crimes and if the co-defendant had participated in the murders, petitioner was unaware of it. Therefore, there was no possibility that petitioner could harm his co-defendants wither by pleading or by testifying. Doc. 17, exh. L, p. 949. Further, Mr. Judkins did pursue a plea bargain in terms of the polygraph test, but the offer was not accepted by the state.

In *Smith v. Newsome*, 876 F.2d 1461 (11th Cir. 1989), the court held that joint representation did not prevent effective plea bargaining on behalf of either client. In that case, two defendants were charged with murder of a special deputy sheriff and tried in separate trials. The state was unwilling to bargain with the defendant they believed to be the trigger man. The other defendant denied any involvement with the crime and refused to testify. Thus, no plea was negotiated for him because he claimed to have no information to offer the state. That case

is similar to the case at bar, where petitioner has claimed no involvement and no knowledge of the crimes and the joint representation did not result in conflict.

Actual Conflict

Petitioner alleges that, in both the *Garcia* and *Martinez* conflict situations, an actual conflict exists when law partners represents [sic] co-defendants simultaneously. To prove an adverse affect on counsel's performance it must be shown that: (1) a plausible alternate strategy existed that might have been pursued; (2) the alternate strategy was reasonable under the facts and (3) there is a link between the conflict and a decision to forego some strategy. *Freund v. Butterworth*, 165 F.3d 839 (11th Cir. 1999) (internal citations omitted). Also, a petitioner must point to specific instances in the record to show that his interests were compromised for the benefit of another party. *Oliver v. Wainwright*, 782 F.2d 1521-1524-25 (11th Cir. 1986). The specific instances of which petitioner complains involve a motion to sever, the alleged failure to cross-examine

eyewitnesses and the waiver of closing argument.

Motion to Sever

Mr. Judkins filed a motion to sever on petitioner's behalf and argued that a separate trial was warranted because evidence existed that might have been admissible against Weeks but not against petitioner, and that petitioner risked "guilt by association" based on his family relationship to Weeks. Counsel also argued that petitioner's defense was based on his alibi witnesses, and since those witnesses could not testify as to the whereabouts of Weeks, the defenses were not based on the same facts and therefore the trial should be severed. Doc. 17, exh. A, pp. 2007-2011. Petitioner claims that had Mr. Judkins properly pleaded the motion to sever by alleging that he planned to put on an antagonistic defense the motion would have been granted. But as discussed earlier, there was no antagonistic defense to present given petitioner's claimed innocence and lack of knowledge. Consequently, if the trials had been separate or if an independent attorney had

represented petitioner, the defense would have been no different. In denying the motion to sever, the trial court stated that the key to the case was Mr. Enfinger's identification of petitioner and Weeks, and that if the jury believed Mr. Enfinger, they could convict the defendants in spite of all the other evidence. Doc. 17, exh. A, p. 2012-2013. Thus, even if there had been separate trials, Mr. Enfinger would still have testified for the prosecution and a different outcome was no more likely.

To justify severance, "the essencé of one defendant's defense must be contradicted by a co-defendant's defense." *Smith v. Kelso*, 832 F.2d 1564 (11th Cir. 1989) *citing United States v. Berkowitz*, 662 F.2d 1127, 1132-34 (5th Cir. 1981). Since both defendants were claiming alibi and improper identification, there was no conflict of defenses.

Cross-Examination

At trial, testimony of the state's witnesses established that those involved in the murder arrived at the crime scene by a green aluminum boat with a white motor. The boat was

owned by Weeks' brother and stored in his father's barn, giving Weeks access to it. Joseph Wells[17] and Leonard "Bluegill" McCurdy were on the river that day and saw the boat carrying two men. Joseph Wells testified that the men were dressed in camouflage clothing, riding in a green boat, and that the man operating the boat had a dark heavy beard. He picked Weeks out of photographic line-up as the operator of the boat, and stated that the other person in the boat appeared to be Weeks' father, a former client of Mr. Judkins. Mr. Judkins did not question Joseph Wells regarding his prior identification of Weeks' father as the other person in the boat. But he did question him as to how long it would take to drive from the area in which he had seen the boat to downtown Jay, Florida, where alibi witnesses had placed petitioner at the time of the crime. Doc. 17, exh. A, pp. 483-485.

Mr. McCurdy testified that he did not pay much

[17]No relation to the petitioner, Lester Wells.

attention to the boat when they passed it and could not identify anyone in the boat. However, he had previously picked Weeks' photograph out of the line-up. Mr. Judkins cross-examined Mr. McCurdy as to the time he saw the boat because he knew that alibi witnesses had placed petitioner at a different location at the time Mr. McCurdy saw the boat. Petitioner complains that the adverse effect of the Martinez and Garcia conflicts of interest also stems from the fact that his attorney did not cross-examine Joseph Wells, one of the eyewitnesses, regarding his prior identification of Weeks and his father as the men he saw on the river in a green boat because of counsel's prior representation of the father.

Petitioner argues that had his attorney cross-examined Joseph Wells, "Bluegill" McCurdy and Deputy Billy Rogers, petitioner's defense would have been adverse to his co-defendant's defense. Petitioner argues that a proper defense strategy would have been to allege in the motion to sever that all the evidence, except for Mr. Enfinger's "questionable"

identification, would have implicated the Weeks family, not petitioner. Thus, but for the conflict of interest, the outcome would have been different. It was not brought out by the prosecutor, Mr. Judkins or Mr. Simpson that Weeks' father had been identified as a passenger in the boat.

Mr. Judkins did not cross-examine Mr. McCurdy further because he did not believe that the testimony was harmful to petitioner. Also Mr. McCurdy was a "likable guy" and Mr. Judkins did not want to risk alienating the jury by making Mr. McCurdy look bad. Doc. 17, exh. L, p. 971, 992. Again, petitioner does not argue an alternative cross-examination. Mr. McCurdy did not identify petitioner as a passenger in the boat. It is illogical now to argue that Mr. Judkins should have cross-examined Mr. McCurdy to prove otherwise. Furthermore he believed that the evidence was clear that petitioner was not in the boat, which is why he did not expand his cross-examination of Mr. McCurdy or of Joseph Wells. Doc. 17, exh. L, p. 1262.

Mr. Judkins testified at the 3.850 hearing that he did not

refrain from cross-examining any witnesses due to prior representation of co-defendants and there is nothing in the record to indicate otherwise. Doc. 17, exh. L, pp. 991-995. *See Mills v. Singletary*, 161 F.3d. 1273, 1288 (11th Cir. 1998). Moreover, petitioner suggests no alternative cross-examination. Therefore petitioner has not shown that an actual conflict of interest existed which prevented extension cross-examination of witnesses. *Porter v. Singletary* 14 F.3d 554, 561 (11th Cir. 1994).

Closing Arguments

Petitioner argues that by waiving his closing argument, his attorney allowed his closing argument to be given by a co-defendant, and that the joint defense only helped Mr. Weeks, who took advantage of petitioner's alibi.[18]

The strategy of the case was that one defendant would

[18]Petitioner argues that Weeks admitted his guilt subsequent to the trial. Even if that were true, petitioner's argument that final argument by a person who "admitted" his guilt is prejudicial is misplaced. Weeks did not admit his guilt to the jury, and the fact that he may have done so later is irrelevant.

put on all of the evidence while the other would put on none. Therefore the defense would still have the opportunity to do the first and last closing arguments. Mr. Judkins testified that ordinarily in a state criminal case in Florida, when a defendant introduces evidence, he is not entitled to beginning and ending closing arguments. This was a rare advantage and one they believed best for their clients. This strategy was also used at the second trial, even though petitioner and Jerry Wayne Weeks were represented by independent counsel at that trial. Doc. 17, exh. L, p. 951-952. Mr. Judkins testified that he thought that having first and last closing arguments was more beneficial than separate trials. Doc. 17, exh. L, p. 1008.

At the 3.850 hearing, petitioner testified that he did not complain of no closing argument because it was his decision, not his attorney's. According to petitioner, based on a discussion he had with his attorney, he made the decision to forego closing argument, and even though he does not now think that it was a good decision, he does not fault his attorney

for it. Doc. 17, exh. L, p. 552.

Counsel's tactical and strategic decision in determining a theory of defense is generally presumed sound and should not be second-guessed under federal habeas review. *Strickland, supra*; *see also Spaziano v. Singletary*, 36 F.3d 1028, 1039 (11th Cir. 1994). Strategic errors are not of constitutional dimension unless counsel's choice of defense theory was unreasonable. *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992); *Harich v. Dugger*, 844 F.2d 1464 (11th Cir. 1988). The decision to maintain first and last closing arguments was obviously a tactical decision to which petitioner agreed. There was no conflict of interest, particularly since the same procedure had been used in the second trial with independent attorneys.

OTHER ISSUES

Although the following issues were not raised in petitioner's habeas corpus petition, they were raised in the memorandum accompanying the petition. Respondent did not

address these issues in his answer. However, for the sake of completeness, the court will address each issue briefly.

Public Interest in the Integrity of the Judicial Process

Petitioner claims that the public interest in maintaining the integrity of the judicial process required that the law firm be disqualified from further representation of petitioner, in spite of his consent, due to the actual conflict of interest.

Petitioner argues that the right to choose one's own counsel is limited in several aspects, one of which is in the case of a conflict. Petitioner cites the American Bar Association's Model Code of Professional Responsibility DR-105(C) and its Model Rules of Professional Conduct Rule 1.7 regarding the limitations on multiple client representations and the role of the court under Federal Rules of Criminal Procedure 44(c) in determining if a conflict exists. Petitioner further argues that a conflict may prevent counsel from rendering effective assistance, and in cases where the court finds an actual conflict of interest, it may decline the waiver. *Wheat v. United States*,

486 U.S. 153, 162 108 S.Ct. 1692, 1698, 100 L.Ed.2d 140 (1988).

Essentially petitioner claims that the trial court should have recognized that an actual conflict of interest existed and declined to accept the waiver. However, as discussed above, petitioner has not shown that an actual conflict existed.

The Need to Protect Public Confidence in the Justice System

Petitioner argues that the need to protect the public confidence in the criminal justice system outweighed his right to counsel of his choice and therefore the waiver of conflict should not be binding. Petitioner cites the two-part test for disqualification of an attorney under Canon 9 of the Code of Professional Responsibility, as set forth in *Woods v. Covington Bank*, 537 F.2d 804 (5th Cir. 1976). There the court held that in order to prevent a rigid application of Canon 9, which states that "a lawyer should avoid even the appearance of professional impropriety," there must be at least a "reasonable possibility that some specifically identifiable impropriety did in fact occur"

and "[T]he likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 813. Petitioner contends that the existence of the *Garcia* and *Martinez* conflicts - the prior representation of state witness Anthony Weeks, the waiver of petitioner's closing argument and the joint defense strategy which benefitted Jerry Wayne Weeks and was detrimental to petitioner - represents the "specifically identifiable impropriety" required to satisfy the first prong of the test. As to the second prong, petitioner argues that there existed an actual conflict of interest, as evidenced by the fact that counsel believed petitioner was innocent, but the judge refused to allow this claim to be pursued at the 3.850 evidentiary hearing because to do so would have been a violation of the attorney-client privilege between Jerry Wayne Weeks and Larry Simpson, and the court should have found that

this conflict could not be waived.[19] Based on that, he says, public policy and due process require a new trial. However, as discussed above, petitioner has not shown that an actual conflict existed.

Furthermore, the court in *Woods, supra*, noted that the frequency of delays or other disadvantages a litigant may suffer due to the unnecessary disqualification of his attorney, the greater the likelihood of public suspicion in the judicial system. *Id.* at 813. By the time of the third trial, the case had been pending in the court system for nearly four years, during which Mr. Judkins had been petitioner's attorney for approximately three and a half years. Disqualifying Mr. Judkins and starting over with another attorney unfamiliar with the case may have increased public suspicion of the judicial system, and it would not have outweighed the legal and social interests of Mr.

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[19]At the 3.850 evidentiary hearing, Mr. Judkins was questioned by petitioner's attorney as to whether Mr. Simpson ever told Mr. Judkins whether Jerry Wayne Weeks was involved in the shooting. Weeks' attorney objected that court sustained the objection on the basis of attorney-client privilege. Petitioner contends that this ruling is erroneous because by also raising a claim of conflict of interest, Jerry Wayne Weeks waived his attorney-client privilege.

Judkins' continued participation. Further, as discussed above, petitioner was familiar with the conflict issue since it arose in his first trial and it had been thoroughly discussed with him by Mr. Judkins. Therefore, petitioner has not satisfied the requirement under *Woods* for disqualification of an attorney in accordance with Canon 9.

The AEDPA Violates the Separation of Powers Doctrine of the United States Constitution

Petitioner contends that the Antiterrorism and Effective Death Penalty Act (AEDPA) requirement that the state court action must be inconsistent with clearly established law as "determined by the Supreme Court of the United States" violates the separation of powers doctrine because it allows Congress to limit the law to be applied in cases of the court's jurisdiction. In effect, federal courts could only consider habeas corpus cases that present issues previously dealt with by the Supreme Court. Petitioner argues that this procedure destroys the system of appellate jurisdiction for habeas cases and

effectively suspends the writ of habeas corpus by not allowing issues not previously addressed by the Supreme Court to be litigated.

The AEDPA does not violate the separation of powers doctrine because it does not limit an inferior federal court's authority to determine the meaning of federal law in any Article III case or controversy. It only restricts the scope of habeas remedies in some circumstances. *Green v. French*, 143 F.3d 865, 874 (4th Cir. 1998). Nor does it effectively suspend the writ but instead is a "modest alteration" of the standards required for issuing the writ. *Id.* at 875.

CONCLUSION

Upon complete review of the record evidence and the arguments presented, this court finds petitioner has, at best, raised only a possible conflict of interest which was waived by petitioner. A possible, speculative or merely hypothetical conflict of interest does not satisfy petitioner's burden of proving an actual conflict. *Porter v. Singletary*, 14 F.3d 554

(11th Cir. 1994); *Lighthouse v. Dugger*, 829 F.2d 1012, 1023 (11th Cir. 1987), cert denied, 488 U.S. 934, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988). Rather, as discussed earlier, petitioner must make a factual showing that counsel made a choice between alternative courses of action. Based upon the record before this court, petitioner has failed to make such a showing. And even if there has been a showing of an actual conflict of interest as defined in *Cuyler v. Sullivan*, supra, the habeas corpus petition should nonetheless be denied because petitioner has failed to demonstrate that the conflict adversely affected the adequacy of his legal representation.

According, it is respectfully RECOMMENDED:

That the petition for writ of habeas corpus (doc. 1) challenging the convictions and sentences in *State v. Lester L. Wells and Jerry Wayne Weeks*, case no. 83-I-534 in the Circuit Court of Santa Rosa County, Florida, be DENIED, that this action be DISMISSED, and that the clerk be directed to close the file.

At Pensacola, Florida, this 29th day of February, 2000.

/s/ Miles Davis
MILES DAVIS
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy thereof. A copy of objections shall be served upon the magistrate judge and all other parties. Failure to object may limit the scope of appellate review of factual findings. See 28 U.S.C. § 636; Local Rule 27(B); United States v. Roberts, 858 F.2d 698, 701 (11th Cir. 1988).

IN THE CIRCUIT COURT IN AND FOR SANTA ROSA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO. 83-I-534

LESTER L. WELLS and
JERRY WAYNE WEEKS,

Defendant.

ORDER DENYING MOTIONS FOR POST CONVICTION RELIEF

This matter is before the Court upon the Motion of the Defendants, Jerry Wayne Weeks and Lester L. Wells, for post conviction relief pursuant to rule 3.850, Florida Rules of Criminal Procedure. The initial motion for post conviction relief was filed by Defendant Weeks, *pro se*, whereas, Defendant Wells' motion for post conviction relief was filed on his behalf by his attorney, Leo A. Thomas, Esq. The Court after reviewing the initial motions was of the opinion that both

Defendants should be represented by counsel and the Office of the Public Defender was subsequently appointed to represent Defendant Weeks. Throughout these proceedings Mr. Weeks has been represented by Dennis Shuman, Esq. The most recent pleading filed herein was that of Defendant Jerry Wayne Weeks on August 3, 1994, which was an amendment and/or supplemental pleading to the pending Motion for Post Conviction Relief. With the exception of the one issue raised in Defendant Week's [sic] Petition for Amendment filed August 3, 1994, the Court conducted an evidentiary hearing over several days on the issues raised in the Motions. Defendant Wells argues that he is entitled to relief for the following reasons:

1. Wells was denied effective assistance of counsel as a result of his trial attorney's alleged conflict of interest caused by his law partner's representation of co-defendant, Jerry Wayne Weeks.

2. Wells is entitled to a new trial based on the

recanted testimony of identification witness, Phillip Wayne Enfinger.

3. Wells is entitled to a new trial based on the ineffective assistance of his prior trial counsel. He more specifically argues that his prior trial counsel was ineffective as follows:

A. Defense counsel failed to object to the introduction of testimony concerning witness Jeff Jackson's attempt to improperly influence the testimony of the two convenience store clerk's [sic], Linda Williams and Helen Rowe.

B. Trial counsel failed to object to numerous improper arguments made by the prosecutor during his closing argument.

Defendant, Jerry Weeks, argues that he is entitled to post conviction relief for the following reasons:

1. Weeks was denied effective assistance of counsel as follows:

A. There was a conflict of interest between his attorney and the attorney representing co-defendant, Lester Wells, because said attorneys were members of the same law firm.

B. Trial counsel failed to call three alibi witnesses that Defendant Weeks disclosed prior to trial.

C. Trial counsel failed to request a jury view of the crime scene and for not advising Defendant Weeks of his right to request a jury view.

D. Trial counsel failed to object to substantial prosecutorial misconduct in closing argument to the jury.

E. Trial counsel brought to the attention of the jury the existence of a prior trial in this prosecution.

F. Trial counsel failed to adequately prepare for trial in the areas of pretrial investigation and crime scene reconstruction.

G. Trial counsel failed to present evidence of shoe cast impressions to the jury where the results of same showed

that the cast impressions did not match those of Defendant Weeks.

2. The sole eye witness recantation of the State's witness, Phillip Wayne Enfinger, would more than probably have changed the jury verdict where there was no other evidence to place the Defendant's [sic] at the crime scene.

The State argues that all motions for post conviction relief on the basis of ineffective assistance of counsel filed by Weeks and Wells after April 13, 1991, are procedurally barred because they were not filed within the prescribed time limitations of rule 3.850, Florida Rules of Criminal Procedure.

This case originated on November 10, 1983, when James E. Wyche and Billy D. Wyche were murdered at a campsite located on the Escambia River in Santa Rosa County, Florida. One Phillip Wayne Enfinger was also wounded at that time and place but recovered from his injuries. The Defendants herein were subsequently indicted for those offenses.

On or about February 19, 1988, Defendants, after trial

by jury, were adjudicated guilty of two counts of first degree murder and one count of attempted first degree murder. The Defendants were each sentenced to life in prison without parole for a period of 25 years on each count of first degree murder to run consecutively and 10 years imprisonment for the attempted first degree murder to run concurrently with the other two counts. Also arrested and charged as a principal to these offenses were Anthony Weeks and Wilbur Weeks the brother and father of Defendant Jerry Wayne Weeks.

Initially, Anthony Weeks was represented by counsel, James Burke, Jr., who was also representing Defendant herein, Lester Wells. Wilbur Weeks was represented by attorney Jimmy Judkins, Esq., who subsequently represented Defendant Wells. At the first trial in this cause, Defendant Wells was represented by James H. Burke, Jr. and Defendant, Jerry Wayne Weeks, was represented by J. LaDon Dewrell, Esq., both of the same law firm. On or about May 1, 1984, the trial of Defendants Wells and Weeks ended in a mistrial and

approximately two weeks thereafter Defendant Wells retained Jimmy Judkins who at that time was also representing Wilbur Weeks.

On or about June 2, 1984, Anthony Weeks, who was then represented by James Burke and Wilbur Weeks who was then represented by Jimmy Judkins were convicted of two counts of principle to manslaughter and principle to attempted manslaughter. In July 1984, Defendants Lester Wells and Jerry Wayne Weeks, proceded [sic] to trial and both Defendants were convicted as charged. Appeals were filed and on or about July 18, 1986, the District Court of Appeal, First District reversed and remanded for a new trial the convictions and sentences of Defendants Wells and Weeks. On that appeal, Defendant Wells was represented by Jimmy Judkins, Esq. and Defendant Weeks was represented by Larry Simpson, Esq. On July 21, 1986, the District Court of Appeal, First District reversed and remanded with directions to discharge Defendants Wilbur Weeks and Anthony Weeks. On their appeal, Wilbur Weeks was

represented by Jimmy Judkins, Esq., and Anthony Weeks was represented by Larry Simpson, Esq., both are lawyers from the same law firm.

Thereafter on February 10, 1988, the case again proceeded to trial against Defendants herein Wells and Weeks and on February 19, 1988, both Defendants were again found guilty as charged. Defendant Wells was represented at that trial by Jimmy Judkins, Esq., and Defendant Weeks was represented at that trial by Larry Simpson, Esq., again both of the same law firm. Defendant Wells testified at the subsequent trial relying heavily on an alibi defense while Defendant Weeks did not testify at said trial. Defendant Wells was sentenced to life imprisonment without parole for 25 years on Count I and the same sentence on Count II with said sentences to run consecutively. A sentence of ten years was imposed on Count III to run concurrently with Counts I and II. Defendant Weeks received the same sentence. Thereafter, the District Court of Appeal, First District affirmed the conviction and sentences of

the Defendants on February 16, 1989, and a mandate was issued on April 13, 1989.

The Motion for Post Conviction Relief filed by Defendant, Jerry Wayne Weeks, was filed in this Court on April 8, 1991, and the Motion to Vacate and Set Aside Judgments of Conviction and Sentences thereupon filed on behalf of Defendant Lester Wells, was filed in this Court on April 9, 1991. On May 2, 1991, both motions were denied by this Court without prejudice because they were not under proper oath and both Defendants were given twenty (20) days to resubmit said motions under proper oath. Defendant Wells [sic] amended motion was filed on May 13, 1991, and Defendant Weeks [sic] Amended Motion was resubmitted on or about May 14, 1991. Said motions have since been supplemented. The Court therefore finds that both Defendants' motions for post conviction relief are not procedurally barred as a result of the two year Statute of Limitations contained in Rule 3.850(b), Florida Rules of Criminal Procedure.

CLAIMS FOR DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL RESULTING FROM DEFENDANTS' TRIAL ATTORNEYS BEING MEMBERS OF THE SAME LAW FIRM.

This Court is of the opinion that there was no actual conflict of interest in this case because there is no evidence that either of the Defendants' counsel adopted a theory of defense which was affected by conflicting representation. In *McCray v. State of Florida*, 510 So.2d 874 (Fla. 1987) the Court, although not deciding whether or not an actual conflict of interest existed in that case, referenced the applicable law regarding that issue in footnote 1 of its opinion. (*Id* at 877). The Court, citing *Porter v. Wainwright*, 805 F.2d 930 (11th Circuit, 1986), wrote that an "actual" conflict of interest exists if counsel's course of action is affected by the conflicting representation, *i.e.,* whether there is divided loyalty with the result that a course of action beneficial to one client would be damaging to the interest of the other client. They recognize that an actual conflict forces counsel to choose between alternative

courses of action citing *Stevenson v. Newsom*, 774 F.2d 1558, 1562 (11th Circuit, 1985). In order to show an actual conflict, one must show that a lawyer not laboring under the claimed conflict could have employed a different defense strategy and thereby benefited [sic] the defense. *United States v. Mers*, 701 F.2d 1321 (11th Circuit), cert. den., 464 US 991, 104 S.Ct. 482 (1983). The footnote further reads that only when such an actual conflict is shown to have affected the defense is there shown prejudicial denial of the right to counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 104 S.Ct. 482 (1980). No such conflict can be shown in the case at hand. In effect, Defendant Wells' defense was that he did not commit the crimes charged nor did he have any knowledge of the crimes charged. He presented what has been characterized by counsel as a "strong alibi defense" which, however, was rejected by the jury. It has also been suggested that the alleged conflict prevented an effective plea bargain but that assertion is not supported in the record. Apparently, at one point in time an offer to plea was made to

Defendant Wells which would allow him to enter a plea to second degree murder in return for his testimony against Defendant Weeks. However, it is clear from Defendant Wells [sic] testimony that he could not be a witness against Defendant Weeks since he purportedly had no knowledge of these murders. He also claims that a second plea bargain was offered that would allow him to submit to a polygraph examination in return for which the charges would be dropped in the event he denied any knowledge of the crimes charged and no deception was noted by the examiner. Assuming that to be the case, that would not require and adverse position against Defendant Weeks so as to create a conflict. With regard to Defendant Weeks, his testimony at the hearing held on the Motion for Post Conviction Relief indicated that he chose not to testify at the last trial because in effect, he was putting forth the same defense as Defendant Wells, *i.e.*, he did not commit the crimes charged because he was somewhere else thereby traveling on Defendant Wells [sic] alibi defense. Regarding a potential plea

bargain for Defendant Weeks, it was apparent from the testimony of Larry Simpson, Esq., that was not an issue nor was it a possibility because the prosecutor did not and would not offer a plea bargain to Defendant Weeks.

WAIVER OF CONFLICT

Although the Court does not believe that an actual conflict of interest occurred under the facts of this case, even if there was such a conflict it was waived by both Defendants. Both Weeks and Wells were aware of the potential for a conflict of interest since it had already been raised in the first trial when they were represented by attorneys LaDon Dewrell, Esq. and James Burke, Esq., of the same law firm. After the issue was initially raised by the State the first trial judge attempted to place the waiver of any conflict on the record. Mr. Dewrell at that time clearly indicated that he represented Defendant Jerry Wayne Weeks, while Mr. Burke represented Defendant Lester L. Wells. He went on to advise the Court that they are not represented by the same counsel and will not in the trial of the

case be represented by the same counsel. After an adverse ruling by the Court regarding opening and closing statements, however, Mr. Dewrell requested that he be allowed to withdraw from any further representation of Defendant Weeks. He advised the Court that he had discussed the matter of the Court's ruling with Defendant Weeks while Mr. Burke had discussed the maatter with Mr. Wells and that both Defendants due to the seriousness of the case indicated that they wanted to avail themselves of their right to totally conflict free individual representation. At that time Mr. Dewrell moved to withdraw and a mistrial was declared. Notwithstanding their clear understanding to have conflict free representation, the Defendants again chose to be represented by counsel of the same law firm. Larry Simpson, Esq., testified that he recognized the potential conflict in the appellate stage and again when he undertook the representation of Defendant Weeks at the second trial. He testified that Defendant Weeks had told him that Wayne Weeks was not going to take the stand to

testify and that Mr. Simpson was not to put on any evidence on Defendant's behalf so as to assure closing argument. He further stated that Weeks did not want his partner (Judkins) to call Weeks' alibi witnesses because of the believability of their testimony as seen by the prior trial. The strategy was always for the first Defendant (Wells) to put on all the evidence and the other (Weeks) to put on no evidence in order to obtain closing argument. Attorney Simpson testified that there were no antagonistic defenses and that he was confident that Defendant Weeks understood the conflict situation and that it was waived because there was full disclosure on his part. James Judkins, Esq., similarly testified that he had discussed the potential for a conflict of interest on several occasions with Defendant Wells. He stated that the first time he discussed this matter was in his engagement letter which was delivered to the Defendants while they were in jail. The conflict issue was again discussed when Larry Simpson, Esq., began his representation of Anthony and Wayne Weeks at which time all four defendants waived any

conflict. After the appeal and before the last trial, Defendants signed another waiver of conflict and the second trial judge was also requested to discuss the issue of conflict with defendants *in camera*. (See also State's Exhibits number 2 and 6). The Court apparently believed that the Defendants understood the conflict situation and that it was waived. James Judkins, Esq., testified that Defendant Wells told him that he was not guilty, that he was not present at the scene of the crime and had no information that would be helpful or harmful to any other persons. Defendant Wells apparently told his attorney that he did not believe there was a conflict that precluded his representation. Attorney Judkins additionally testified that he did not feel restricted in his representation of Defendant Wells as same related to negotiated pleas because he had determined from Defendant Wells that even if he had entered a plea it could not impact on any of the other three defendants because Wells did not have any information regarding the shooting. Although Wells' counsel moved for a severance of the trials that motion

was denied. Judkins further testified that no opportunity existed to shift the burden from Defendant Wells to Defendant Weeks. He stated that the opportunity did not exist during the first trial when there were separate attorneys and there was no reason to believe that it would exist in the second trial. He further testified that he would have withdrawn had he thought that that was a real possibility.

This Court is satisfied from the evidence presented that if in fact there was a conflict of interest created by representation of these two defendants by the same law firm, that any conflict was freely, voluntarily and intelligently waived after the Defendants were made aware of the potential for said conflict.

NEW EVIDENCE

Both defendants also allege that they are entitled to a new trial based upon the recanted testimony or new evidence relating to the identification of the perpetrators by State's witness Phillip Wayne Enfinger. The Court has carefully

considered the testimony of Mr. Enfinger wherein he recanted his prior trial testimony and finds that the purported recantation of the trial testimony is not credible. Mr. Enfinger was one of the victims who was shot in the incident in the Escambia River on November 10, 1983. He sustained injuries to the head and shoulder and at the hearing on January 29, 1993, testified that he was no longer sure of the identity of the perpetrators. He so stated because at the time he was wounded, he was in the river and the water was cold. He testified at trial, however, that he observed the defendants from a distance of approximately 75 to 100 yards and at the time he believed his testimony was correct when he identified both defendants herein as the perpetrators of the crimes for which they were convicted. He also admitted that his original testimony was based upon what he saw and not what someone had told him. Significant to this court is that Mr. Enfinger knew both of these defendants since high school and was very familier with both of them. In his attempted recantation, Mr. Enfinger never said that these defendants were

not the perpetrators but only that he was no longer sure as to the identity of the perpetrators.

As background to the recanted testimony, Mr. Enfinger testified that he approached Defendant Week's [sic] brother indicating his uncertainty but that he only did so after being told by one Faye Baxley that there might be a new trial in this case and that he would have to testify once again. He readily admitted under cross examination from the prosecutor that he believed that he would have to testify once again as an eye witness and that the stress from testifying in both the first and second trials was bad for him. He further testified that he did not want to have to go through that again and that by giving an affidavit to Anthony Weeks recanting his testimony he was hoping that he would not have to testify. He did, however, maintain that the affidavit was true. The direct questions by the prosecutor were as follows:

Q. Did you give the affidavit so you would not have to testify at another trial?

A. I was hoping that I would not.

Q. Is that a yes?

A. I was hoping that I wouldn't.

Additionally, Mr. Enfinger readily admitted that the affidavit was not written by him nor was it typed by him.

Furthermore, although Mr. Enfinger believed his testimony to be correct at the time he testified, he stated to the prosecutor during cross examination that he believed he must have been wrong because a lot of good people told him that Defendant Wells was not at the river at the time of the incident. When pressed for the names of those people, the only one he could identify was Billy Hullet who was a brother-in-law of one of the defendants. He further testified that he believed that he was truthful in identifying the defendants when he identified them to law enforcement officers at the Jay Hospital on the morning of the shooting when they were "stitching" him up and "fixing" him up. He further testified that he believed he was truthful when he identified the defendants to the prosecuting

attorneys who interviewed him shortly after the incident occurred, as well as to defense attorneys at the time he gave his deposition. He told them he was sure at the time of his identification and that he remained sure for approximately eight years thereafter. He testified that he knew the defendants all his life, off and on, that he went to high school with them, and that he was familiar with the way they appeared and the way they looked. He further testified that he was familiar with the way they walked and talked and that he could recognize them again today if "they were across the street". [sic] After cross-examination, it was apparent to the court that the affidavit recanting the testimony was not prepared by the witness nor was some of the language used in the affidavit that of the witness. The witness admitted to the prosecutor that he wanted to be accepted and it was difficult not being accepted by testifying against these defendants in that small community of Jay. All premises considered, therefore, the Court is of the opinion and finds that the testimony originally given by this

witness to investigators and prosecutors shortly after the time was committed and at his deposition and subsequent trials was given when the matter and facts were clear in his mind and that his identification of the defendants which he had known all his life was such that a reasonable jury could rely upon same and was credible enough for the jury to return guilty verdicts even in light of Defendant Wells [sic] alibi defense. The Court is further of the opinion that the witness' [sic] recantation was motivated by his desire to avoid having to testify once again in a subsequent trial, and that a jury composed of reasonable men and women if they were to gain hear this cause would reject the recounted testimony.

INEFFECTIVE ASSISTANCE OF COUNSEL

A. Defendant Wells alleges his trial counsel was ineffective for failure to object to the introduction of testimony concerning witness Jeff Jackson's attempt to improperly influence the testimony of the two convenience store clerks, Linda Williams and Helen Rowe.

Defendant Wells cites several cases which basically hold that any third person's attempt to influence a witness is inadmissible as to the issue of the defendant's guilt unless the defendant has authorized the third party's action. As near as can be determined, however, the authority cited by Defendant Wells deals with evidence introduced by the State on direct examination. In the case at hand, Jeffrey Jackson was called as an alibi witness by Defendant Wells to account for that defendant's whereabouts on the day of the murders. Defendant's whereabouts at 10:00 a.m. on that morning are extremely relevant because if he was at a convenient [sic] store at that time rather than an hour and a half to an hour earlier he could not have been at the scene of the shooting shortly thereafter. The relevant portion of the cross examination as cited by the prosecutor is as follows:

Q. Do you recall going back to the convenience store the next day and talking to them?

A. Yes, sir.

Q. Do you recall telling them the next day to remember that you and Lester were there at 10:00 a.m.?

A. Yes, sir, I asked them.

Q. Okay. Well, Mr. Jackson, could you explain how it was that you could remember to tell them that you were there at 10:00 the day after the shootings, but you are telling us now you never remembered what time?

A. I never told them it was 10:00?

Q. Are you saying you did not go the convenience store and tell them and remind them that you were in there at 10:00?

A. I went to the convenience store and just asked them did they remember me coming up there that morning, not to forget, because I knew that when I got questioned, that they would come and ask about it, and you know, did they remember.

Q. Do you deny reminding them of a specific time, do you deny that?

A. I don't deny it, but I don't remember.

Q. Do you deny mentioning a specific time?

Mr. Judkins: Objection, asked and answered.

Thereafter, the State called Helen Rowe and Linda Williams as rebuttal witnesses who testified that witness

Jackson was in their store early on the morning of the day of the murders. She further testified, over objection, that Jackson returned to the store after being questioned by the State attorney, and reminded her that he was there at 10:00 a.m. It is this Court's opinion that unlike the cases cited by Defendant Wells wherein the State introduced evidence on direct examination of third parties attempting to procure favorable testimony from a witness for a defendant that the effect of the testimony of Rowe and Williams was to impeach the credibility of Jeffrey Jackson and his testimony. The Court therefore finds that Defendant Wells was not denied effective assistance of counsel for his attorney's failing to object to the introduction of testimony from witnesses Linda Williams and Helen Rowe.

B. Trial counsel was allegedly ineffective for failure to object to numerous improper arguments made by the prosecutor during his closing argument.

Defendant Wells argues that counsel was ineffective because they failed to object to the prosecutor's comment to the

jury that if they decided the case based on the defense's theory then the would not be doing their duty. The prosecutor's argument in the case at hand falls short of that comment made and which required a reversal in the case of *Reddish v. State*, 525 So.2d 928 (1st DCA 1988). Defendant Wells points out that in the *Reddish* case the offending statement was as follows:

"Gentlemen, if you succumb to the defense argument, you would be in violation of your oath as jurors."

In the case at hand, the state argued:

"But I think the judge in his instructions to you has pointed out something that is very elemental in this case, that you are to decide the case based upon the evidence and in accordance with the law that he gives you, because if you ignore the evidence in this case evidence of an eye witness, the evidence of motive, the evidence of opportunity, the evidence of a means to due [sic] this, and you decide this case based on some theory of the defense as to some model crime scene investigation, some model homicide investigation and some imperfect world that the defense would apparently have you live in, then you are not doing your duty."

It appears to this Court that the point the prosecutor was attempting to make in his argument was that the jury must base their decision upon the evidence and the law. Thereafter, he

cited the eyewitness evidence, motive evidence, opportunity evidence, and means and ability to commit the crime and that they must weigh the actual evidence and facts presented as opposed to what a "perfect" investigation might or should be. The duty a juror has is to determine whether or not the State had proven it's [sic] case beyond a reasonable doubt and not whether or not law enforcement conducted a "model" crime scene or homicide investigation.

The remaining allegations of ineffective assistance of counsel for failure to object to closing argument did not meet the test for ineffectiveness as established by the United States Supreme Court in *Strickland v. Washington*, 466 US 668, 692 (1984). Therein the Court held that a defendant must prove that counsel's performance fell below an objective standard of reasonableness and that there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Defendant Wells has failed to carry that burden.

C. Defendant Weeks alleges that trial counsel was

ineffective due to his failure to call three alibi witnesses disclosed to counsel by defendant prior to trial. The testimony of Defendant Weeks [sic] attorney, Larry Simpson, was that they did, in fact, discuss calling these alibi witnesses but they did not want these witnesses called because of their credibility as seen from the results of the prior trials. The parties developed a strategy as previously indicated that Defendant Wells would put on his evidence including alibi witnesses and that Defendant Weeks was to put on no evidence in order to assure closing argument. Hence, this Court finds that a strategy developed between counsel and his client does not amount to ineffective assistance of counsel.

D. Defendant Weeks also alleges that his trial counsel was ineffective for failing to request a jury view of the crime scene and for not advising the defendant of his right to request a jury view.

Here again, although Mr. Simpson testified that he did not discuss the jury view issue with the defendant it was

something that he considered and rejected because he believed that it would be detrimental to his client's case if the jury viewed the scene and believed that identification could be made by the witness Enfinger. Attorney Judkins testified similarly that he did not ask for a jury view because he did not want the jury to have a view of the scene because if they saw the scene when the river was low the jury might realize that you could see across the river and recognize persons. He specifically stated that he was relying upon the photo at trial because it made it appear as though it was a lot further [sic] across the river than it actually was. This also appears to be a trial strategy and/or tactic and does not constitute ineffective assistance of counsel.

E. Defendant Weeks further alleges that trial counsel was ineffective for not presenting evidence of shoe cast impressions to the jury where the FBI results show the cast impressions did not match those of the defendant. The cast impressions referred to by Defendant Weeks were those found a distance from the crime scene and on the opposite side of the

river from where the murders were committed. With regard to impressions found at the crime scene, however, Weeks [sic] counsel was successful in a Motion in *Limine* to preclude shoe print comparisons from being presented to the jury. Those impressions matched the defendant's [sic] shoes in size both for defendants Wells and Weeks. Defendant Weeks now urges to find counsel ineffective for not attempting to introduce cast of shoe impressions from an area not related to the crime scene when in fact doing so may have opened the door for the State to then introduce evidence of the impressions taken at the actual crime scene which would have been highly detrimental to the defendants.

F. Defendant Weeks also urges that trial counsel was ineffective because he brought to the attention of the jury the existence of a prior trial in this prosecution.

This comment was made during the cross examination of the State's eye witness in an attempt to impeach the witness on the basis of a prior inconsistent statement. Upon objection,

the trial court admonished counsel to refer to same as a prior court proceeding and in either case there apparently was no disclosure as to the outcome of the prior trial and therefore would be considered harmless error. *Haliburton v. State of Florida*, 561 So.2d 248, 251 (Fla. 1990).

G. Defendant Weeks also suggests ineffective assistance of counsel due to inadequate trial preparation regarding crime scene reconstruction and pretrial investigation.

Counsel alleges that trial counsel was ineffective for failing to call James Burke and Larry Baxley to establish a measured distance of 324 feet as the distance from the only eye witness to the gunman. The eye witness testified that he was approximately 100 yards from the defendant and this variance of approximately 8 yards does not appear to be significant for someone who also testified that he knew the defendants all his life. Additionally, if trial counsel called James Burke and Larry Baxley they would lose the right to closing argument which would be directly contrary to the strategy adopted by Defendant

Weeks which was to allow Defendant Wells to put on a strong alibi defense while assuring Defendant Weeks the right to closing argument.

H. Defendant Weeks [sic] trial counsel was ineffective for failing to discover the existence of a substantial evidentiary discrepancy on an essential element of the prosecution.

Specifically, Defendant Weeks alleges that trial counsel Simpson was ineffective because he failed during pretrial investigation to discover that a field report was not prepared by the officer who testified concerning the contents of the report but was, in fact, prepared by one Roy Cotton as opposed to the testifying officer, Billy Rogers. The report for the most part deals with a lineup and a resulting interview of witness McCurdy. At the hearing in this cause, attorney Simpson was questioned about McCurdy by the prosecutor.

Q. What do you think the impact was at the time of the testimony of McCurdy, Mr. Rogers and Mr. Wells, upon your client's case?

A. I thought that it came off about as well as we could hope for it to in the trial. Mr. McCurdy said he did not and could not identify anybody. And we ended up in a situation where he caught one of the investigators relying on a report that he did not write. I remember that.

It is clear no harm resulted from this claim.

Additionally, the record also reflects that Weeks' trial counsel objected to the report coming into evidence as being hearsay and "just about every other objection that I can think of." He objected to the identification and the objection was overruled. It would appear therefore to this Court that that was an issue that should have been raised on appeal and is therefore procedurally barred.

I. Finally, Defendant Weeks [sic] Amendment and/or Supplemental Pleading filed August 3, 1994, deals with a hearsay statement made by a law enforcement officer who testified prior to the victim, therefore, putting a cloak of credibility on the victims [sic] testimony.

Specifically, Defendant Weeks makes reference to the testimony of deputy Edward Johnson who testified that he was

dispatched to the Jay Hospital at approximately 11:30 a.m. on November 10, 1983. He further testified that he took a recorded statement from a wounded civilian named Wayne Enfinger wherein the victim identified by name those individuals who shot him. However, the statements were objected to by counsel for both Defendant Weeks and Wells on the grounds that they were hearsay but nevertheless admitted into evidence over objection. The prosecution argued that they were not hearsay statements because it was a statement of identification but even if it was hearsay it's an excited utterance made within thirty minutes of the shooting and therefore an exception to the hearsay rule. (Exhibit 1)

In either case, the statement was admitted over objection and should have been the subject for review on direct appeal. Therefore, it is procedurally barred from review pursuant to Rule 3.850.

The foregoing premises considered, it is

ORDERED AND ADJUDGED that the motions of the

Defendants, Jerry Wayne Weeks and Lester Wells, for post conviction relief pursuant to rule 3.850, Florida Rules of Criminal Procedure are hereby denied. DEFENDANTS ARE HEREBY ADVISED OF THEIR RIGHT TO APPEAL THIS ORDER WITHIN THIRTY (30) DAYS OF THE RENDITION HEREOF AND OF THEIR RIGHT TO FILE A MOTION FOR REHEARING WITHIN FIFTEEN (15) DAYS HEREOF.

The Clerk of Court shall promptly serve upon the defendants and their counsel a copy of this Order noting thereon the date of service by an appropriate certificate of service.

DONE AND ORDERED in chambers at the Santa Rosa County Courthouse, Milton, Florida, this 29th day of September, 1994.

/s/ Paul A. Rasmussen
CIRCUIT JUDGE

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